Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1744

ANDY WALLACE BARNETT ..... PETITIONER

VS.

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

United States District Court, District of Eastern Kentucky, sentenced the petitioner, Andy Wallace Barnett, to five years imprisonment for violation of Conspiracy to Violate Title 21, USC, Sections 846 and 841 (a)(1), by knowingly and intentionally distributing ten pounds of Cocaine, and to violate Title 18, Section 471, USC, by counterfeiting an obligation of the United States with intent to defraud and likewise five years imprisonment of knowingly and intentionally distributing 1.13 grams more or less of Phencyclidine, a controlled substance set out in Schedule III of Title 21, Section 812, USC, and in violation of Title 21, Section 841 (a)(1), USC.

Upon Appeal to the Circuit Court of Appeals, Sixth District, the Court entered an Order on January 4, 1977, affirming the conviction of conspiracy to violate both of the afore cited sections and reversed the conviction as to Count 2 of Knowingly and Intentionally Distributing a Section 3 Controlled Substance. No opinion was rendered by the Court.

Grounds on which the jurisdiction of the Supreme Court is invoked are as follows:

1. The date of the Judgment sought to be reviewed was entered January 4, 1977.

2. There was no request for rehearing or any motion granting an extension of time within which to petition for Certiorari.

3. Petitioner believes he is entitled to Certiorari upon the grounds that the Circuit Court of Appeals of the Fifth District, in *United States* vs. *Bueno*, 447 Federal 2nd 903, 1971, is inconsistent with the Judgment of the Circuit Court of Appeals of the Sixth District.

Question presented for review is whether the fact that a paid government informer instilled the idea for the conspiracy in the mind of the petitioner as the method of recouping the loss of $25,000.00 by petitioner and the fact that the paid government informer led the petitioner in the course of this ruse into what appeared to be a conspiracy, the informer

obtaining counterfeit negatives and pretending to set up counterfeit and drug operations along with and under supervision of the Federal Bureau of Investigation, Secret Service and Drug Enforcement Administration constituted entrapment based upon conduct upon the part of the government so reprehensible as to violate the petitioner's right to due process under the Constitution where the informer was not presented at the trial of the action on behalf of the Government.

UNITED STATES LAWS OF THIS CASE

This case involves the Fifth Amendment of the Constitution of the United States of America; Title 21 USC, Sections 846 and 841 (a)(1), and Title 18 USC, Section 471.

Andy Wallace Barnett, from hereon called Barnett, was the general manager of Foothills Diesel Co., in Clay City, Kentucky, in the Spring of 1973. (Tr. p. 1221)

Barnett had loaned the sum of $25,000.00 to a boyhood friend, one Ronnie Bales. Bales had lost the money in some type of venture with the possibility of his repayment of the money to Barnett an impossibility if the money was not recovered. (Tr. p. 1222-23)

Bales introduced Barnett to one Hendricks who was employed to collect the money from some Stepp

brothers of Dayton, Ohio. (Tr. p. 1140-41), (Tr. p. 1191)

Hendricks was in fact, over a period of years an informer for the Federal Bureau of Investigation, Secret Service, Postal Department, Alcohol, Tax and Firearms of Internal Revenue and other local and state agencies. (Tr. p. 1131 through 1133)

During June of 1973, Hendricks came to meet Barnett at the Catalina Motel in Lexington, Kentucky, to report upon the progress of his collection. He brought with him the unindicted co-conspirator, Gaylord "Bruiser" Leet, to assist him. (Tr. p. 73-74)

During the conversation, Hendricks told Barnett that there was a man in jail in Cincinnati, Ohio who not only had information on the whereabouts of the Stepp brothers, but would pay one who provided him with a bond premium, the sum of $10,000.00 when he got out of jail. Barnett advanced the money and Hendricks and Leet went to Cincinnati and gave bail for Harvey Gene Love. (Tr. p. 76) also (Tr. p. 1225-26-27)

During the trial Harvey Gene Love was identified as a government informer, By Michael Baron, FBI agent, and Thomas Powell, DEA agent. (Tr. p. 333) and (Tr. p. 544-545-584)

Upon his release from jail, Love went at once to a pusher of drugs in Cincinnati, known of by Agent

Thomas Powell of DEA, the Cincinnati office, by the name of Neil Przybyla. There Love obtained several packets of drugs, described as a small foil packet, containing an off-white powder. (Tr. p. 153-154)

The three, Hendricks, Leet and Love returned to Lexington to a motel where they met Barnett and Rice Vince Wills, Jr. At this time Love told Barnett that he would have to go to Florida to get Barnett his money and further information about the lost money. (Tr. p. 155)

Barnett told the group that he had to go to Pensacola in Florida to meet with a customer, Gulf Coast Paving and Grading Company, and since Love needed to go to Orlando, he would take them that far. (Tr. p. 1231) (Tr. p. 1235)

Barnett left the group at the Ramada Inn Downtown in Pensacola, after the others had arranged to go on to Orlando. It was here that the unindicted co-conspirator and Love went out on the town, as both were taking a drug of the speed nature. It was also here that the unindicted co-conspirator, Leet, said there was talk of drugs and counterfeit, although he is the only one who so testified. (Tr. p. 93)

Barnett left the group and flew with a pilot to West Memphis where he collected $1,500.00 from an equipment customer and then flew home to Clay City, Kentucky. (Tr. p. 1235)

In Orlando, Leet and Love left Hendricks and Rice Wills and drove directly to a house in Orlando, where Love was met by a man known as "Don". Leet testified that evidently he was known and expected as they greeted each other and the two negatives of U. S. currency was passed from Don to Love with no payment. The entire transaction took long enough for Leet to "smoke a joint".

Rice Wills was along solely to return the $10,000.00 to Lexington for Barnett. Wills called Barnett after a period of time and told Barnett they were not coming up with the money, but playing around and takin' dope on Barnett's money, and not accomplishing anything, and that he was coming home. (Tr. p. 1236) Wills then did in fact fly back to Lexington.

Barnett then returned to Florida and talRed with Love alone and Love informed Barnett that Love needed to go to Baton Rouge to get the information and money. (Tr. p. 1240)

Love took Hendricks and Leet to Baton Rouge where he left them, and made a telephone call to the FBI office and contacted an agent who had worked with him before, and knew that Love was facing counterfeit charges in Cincinnati. (Tr. p. 333)

Upon information supplied by Love, Baron and a fellow agent Wood, went to the motel and posed as used car salesmen. (Tr. p. 308)

Hendricks, Love and Leet explained to the agents they had a source on a ship wherein they could obtain one hundred pounds of cocaine. (Tr. p. 308)

Hendricks and Love then made a proposition that they had counterfeit plates (which they did not) and if Baron could get the press, paper and ink they could print $10,000,000.00 and sell it to the president or a minister of the Dominican Republic. Love was asked to leave the room as Baron said he did not trust him or Leet. (Tr. p. 311)

Agent Baron said, after Love and Leet had left the room that he would be interested in the cocaine, but would want a sample. Hendricks asked him if he could come to Cincinnati, and the agent said no but that a man by the name of Sam Moran would contact Hendricks at a number Hendricks gave him in the Cincinnati area. (Tr. p. 315)

Agent Baron then notified the Drug Enforcement Administration in Baton Rouge, which in turn notified the DEA office in Cincinnati and the matter ended up with Agent Tom Powell. (Tr. p. 544-45)

Then Love went directly to Cincinnati to meet and work with Agent Powell, arriving there on August 24th, 1973. (Tr. p. 544)

Hendricks called Barnett from the Motel, in fact, (Tr. p. 1245-46) Hendricks introduced Baron to

Barnett on the phone as Moran. Moran (Agent Baron) told Barnett that he Moran was in the counterfeiting business, and had all types of equipment, but there was no market and he wanted dope. Barnett asked him if he had any money for dope, and the agent said he had $150,000.00 in a brief case with him and that he would show it to Hendricks. (Tr. p. 1246) Barnett was attempting to draw money out front from the people they were looking for to recoup his loss. (Tr. p. 1247) Barnett did not know what had transpired between Hendricks and Agent Baron, and had no way of knowing. (Tr. p. 1247)

Hendricks told the FBI agents at the motel that Barnett could come up with anything, dope, counterfeit, just name it. As a fact, Barnett had nothing to come up with. (Tr. p. 1248) Barnett and Hendricks let Love go his way, because the agents in setting up the plan said they did not trust him, Love. Barnett readily agreed as he did not want to interfere with the people who had taken the money from Bales that Barnett had loaned him in bringing the money up front where he could get it back. (Tr. p. 1252)

A meeting was arranged in Jerry's Restaurant in Lexington to present the sample of cocaine to Tom. (Powell undercover). Present in the building were Barnett, Wills, Hendricks and his wife. Tom (Powell) and Don (Agent Ashton) had discussed

cocaine with Barnett and said they wanted the sample to make sure it was pure. Barnett had asked for them to bring $150,000.00 up front if they made a sale, and Tom said he might get $100,000.00, but it was dependent upon the sample. (Tr. p. 1252)

Barnett and the others remained inside and Hendricks went out and placed a foil packet in a crack in a brick wall, whereupon Powell took it out. The packet had been given to Hendricks by Love. (Tr. p. 534-35)

The sample, it developed, was Phencyclidine, and not cocaine. Barnett did not know at this time what was in the packet.

Tom Powell called Barnett and told him whatever was in the packet or sample was not cocaine at all in an irate manner. Barnett informed him he did not know where the sample came from, although Barnett had been told that Love furnished it. (Tr. p. 1258)

Barnett tried to keep the pretended sale going and pushed it up to ten pounds for $150,000.00 to be delivered in Georgetown, Kentucky at the Scottish Inn. (Tr. p. 1259)

Barnett went to the Georgetown meeting with no cocaine, and he never had seen any. (Tr. p. 1262)

Barnett met in Georgetown with Tom Powell and Don Ashton. They showed him $15,000.00.

Barnett made some phone calls for Rice Wills and never did talk with him. In the meanwhile, a Cadillac automobile pulled up and asked Barnett if he was with the FBI. Tom and Don were informed of this and they said not to worry about it. (Tr. p. 1263-1264) Barnett knew that these were not dope dealers, or anyone who was about to bring the money up front where he could recoup his losses as told by Hendricks and Love, or they would have thought it to be important that the FBI was in the area.

Barnett knew at this time that he had been duped by Hendricks, Leet and Love. He was not interested in the $15,000.00 he had told them to return with $45,000.00 on the weekend for three pounds. Tom and Don told him when he was ready to deal, let them know. (Tr. p. 1265)

Barnett made no further attempts to collect his original money or the $10,000.00 promised by Harvey Gene Love. Barnett never saw Tom or Don until he was arrested by them several months later. The indictment was not returned until April 14th, 1974. (Tr. p. 1267)

Barnett contacted Hendricks and asked him what was going on after the Georgetown meeting and Hendricks offered only the explanation he did not expect this to come out this way. (Tr. p. 1267)

Harvey Gene Love was not produced as a witness. Barnett was not cross examined by the United States.

FEDERAL JURISDICTION

The basis of Federal Jurisdiction in the Court was for alleged violations of Federal Statutes.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioner relies for the allowance of the Writ herein prayed for on the basis that a conflict exists with a decision of the Fifth Circuit Court of Appeals in the case of *United States* vs. *Bueno, Supra,* and in the case of *United States* vs. *Barnett* wherein in the Bueno case, the government informer who supplied the contraband was not introduced at the trial and the Court held that the conduct of the government by and through its informer and its agents was so reprehensible as to violate defendant's due process; that in the present case, even a stronger set of facts exist why Bueno should have been followed and that in the opinion of the petitioner, *United States* vs. *Hampton,* 44 USLW 4542 (U. S. April 27, 1976) did not settle this case or reverse Bueno since the informant was produced and did testify in Hampton.

In support of this petition, the petitioner would argue that in *United States* vs. *Russell,* 411 U. S.

423 (1973) 93 S. Ct., 1637 (1973) when Mr. Justice Rehnquist admitted that there well may be a case where a constitutional violation might apply to entrapment the petitioner feels that his is this case.

Further, that when analyzed, the *United States* vs. *Hampton* shows in following their reasoning in each of the opinions, the Court would vote 6 to 3 that *Barnett* vs. *United States* meets the standards of the objective test of entrapment and that Barnett's conviction should be reversed and that this case would make a land mark holding to clarify and to enlighten the Courts on the subjective and objective tests for entrapment.

WHEREFORE, petitioner prays the United States Supreme Court to grant him a Writ of Certiorari upon this important question.

Respectfully submitted,

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JOHN P. HEHMAN, Clerk

Nos. 76-1373, 1374 and 1375

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

ANDY WALLACE BARNETT (76-1373)
RICE VINCE WILLS, JR. (76-1374)
GERALD PATRICK HENDRICKS (76-1375)

Defendants-Appellants

ORDER

Before: EDWARDS, LIVELY and ENGEL, Circuit Judges

These consolidated appeals challenge the convictions of appellants Barnett, Wills and Hendricks of conspiracy to violate 21 U.S.C. §§ 846

and 841(a)(1) by knowingly and intentionally distributing ten pounds of cocaine and to violate 18 U.S.C. §471 by counterfeiting obligations of the United States with intent to defraud and, in count II, of knowingly and intentionally distributing 1.13 grams more or less of phencyclidine, a Section III controlled substance as defined in 21 U.S.C. § 812, in violation of 21 U.S.C. §841(a)(1). While numerous allegations of error and violation of defendants' respective rights are alleged with respect to the conviction of count I, the court, upon a careful review of the briefs and records of the case, is of the opinion that those claims are without merit and that no error intervened to deprive the defendants of a fair trial on that count.

With respect to count II, however, it appears that, upon the undisputed proofs and any reasonable inferences to be made therefrom, none of the defendants was aware that the substance which was distributed was, in fact, phencyclidine as described in said count and that, therefore, there was insufficient evidence of this element of the offense to warrant submission of the issues to the jury, appellants having preserved their rights on appeal by timely motions for acquittal. Accordingly,

IT IS ORDERED that the sentences and convictions of count II be vacated and set aside and the cause remanded for dismissal of said count as to

defendants herein, but that the sentence and judgment of conviction of count I is in each instance to stand and is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

* * * * * * *